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No. 10-724

Supreme Court, U.S.
FILED

In The
Supreme Court of the United States

JANET HATMAKER,

Petitioner,

v.

MEMORIAL MEDICAL CENTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the "participation" clause of the anti-retaliation provision of Section 704(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-3(a), protect a worker who prior to her dismissal from employment had not filed a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission, or otherwise testified, assisted, or participated in any manner in any proceeding or hearing triggered by the filing of a Charge of Discrimination with the U.S. E.E.O.C., had not indicated any intention to file a Charge of Discrimination with the U.S. E.E.O.C., and whose pre-dismissal reports to her employer did not claim the existence of any gender based discrimination in her workplace?

RULE 29.6 DISCLOSURE STATEMENT

Respondent, Memorial Medical Center, is an Illinois not-for-profit corporation, wholly owned by Memorial Health System, an Illinois not-for-profit corporation. Neither corporation identified herein is a subsidiary or an affiliate of a publicly held company. No publicly held company owns 10% or more of the membership interests of Memorial Medical Center or Memorial Health System.

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Civil Rights Act (1964), Title VII, Section 704(a)
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STATEMENT OF THE CASE

In its August 30, 2010, Opinion, the Seventh Circuit describes the Petitioner, Janet Hatmaker, as a "busy-body" with a "preoccupation with superficial characteristics of her new boss [Rev. Greg Stafford]" who exercised bad judgment, harped on irrelevant but sensitive issues of religion and race and who in fact admits that she had no evidence that her boss had engaged in any discriminatory conduct. (App. pg. 12, 7, 10, 13). The Seventh Circuit thus, like the U.S. District Court before it, found her employer, Memorial Medical Center (hereinafter "Memorial") to be entitled to a summary judgment when Hatmaker claimed that her discharge from Memorial's employment was due to her "participation" in an internal investigation within the scope of Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a). The Statement of the Case provided to this Court by Hatmaker presents herself in a far more noble light. However, Hatmaker can only achieve that standing by selectively pulling isolated facts from the record, ignoring relevant evidence, and unfortunately at times misrepresenting the record as explained below.

Hatmaker begins by representing herself as "the most senior member of [Memorial's] chaplain staff." (Petition, pg. 4). That is not accurate. Hatmaker had in fact retired from Memorial's full-time chaplain staff in 2001 and at the times relevant to this dispute served it only on a *per diem* basis working only two to four night shifts during the course of a month. She admits that as a result she very seldom ever saw or

interacted with Stafford, but yet felt fully competent to comment as to Stafford's ability to direct Memorial's chaplain department.

While Hatmaker did communicate with Stafford's boss, Woody Hester, on February 25, 2007, and March 6, 2007, about Stafford's candidacy for chaplain department director, her concerns at that time were simply her belief that Stafford was not an effective public speaker, that he seemed to major in small talk, and sacrificed dignity and leadership in exchange for popularity. Nowhere in those communications did she directly accuse Stafford of being "not professional" as she now alleges in her Petition (Petition, pg. 4) or otherwise having any issues with women.

Hatmaker also overstates the nature and extent of the communications she had with others following Stafford's appointment as director of the chaplain department in late March of 2007. Hatmaker did not testify that Rev. Julie Hoving felt that *staff* concerns about Stafford had been ignored by Hester. (Petition, pg. 5). She only testified that Hoving was disappointed that nobody asked Hoving for her own opinion about Stafford during the selection process. Hatmaker alleges that Hoving would have shared that Hoving did not find Stafford to be helpful when Hoving brought problems to him to help solve but did not know why Hoving held this belief. Hatmaker's Petition goes on to represent that two other women, Julie Blythe and Dawn Victor, were female members of Memorial's chaplain staff with concerns about Stafford. They, however, were not on Memorial's

chaplain staff and provided to Hatmaker no specific examples of why they did not like Stafford. Thus, the "significant number of women on staff" with concerns about Stafford identified by Hatmaker in her Petition were only three in number – Hatmaker, Hoving, and Sister Mehigan (who did not like Stafford's one-time use of a restroom analogy to make a point about team work). (Petition, pg. 6).

Based on the identified isolated and vague comments of these individuals, as well as her own occasional interactions with Stafford, Hatmaker on April 30, 2007, drafted an email to Hester questioning for the first time Stafford's "leadership in relationship to women." This led to her being interviewed by MMC human resources staff member, Anita Lengacher, on May 7, 2007, to determine if there was any substance to her statement about Stafford's ability to interact with women. There was not.

At her deposition, Hatmaker admitted that Lengacher correctly summarized their May 7 discussion as one in which Hatmaker confessed that Stafford had never treated Hatmaker in a sexist fashion or differently than anyone else in the department. Rather than accusing Stafford of having a "diminished view of women in ministry" as alleged in the Petition (Petition, pg. 11), Hatmaker only speculated that since Stafford was a Southern Baptist, that he might be influenced by what she believed to be Southern Baptist "traditions" about women in the ministry. Moreover, Hatmaker did not relate that another pastor accused Stafford of *creating* a "good

ole boys network" (Petition, pg. 11), but only that a pastor said in passing and without explanation that "it feels like a good ole boys network."

Lengacher prepared a memo summarizing her May 7, 2007, meeting with Hatmaker and provided that memo to Hester. In quoting from that memo on page 11-12 of her Petition, Hatmaker omits several essential portions. For instance, Hatmaker selectively omits that Lengacher also reported to Hester that Hatmaker was unable to verbalize any specific examples of any disparate treatment engaged in by Stafford or otherwise support the comment that Stafford "puts down women." Also omitted was Lengacher's statement that Hatmaker said that Stafford had many strong points including his sense of humor, presentation of himself, and his compassion toward others.

Hatmaker's Petition goes on to mischaracterize her May 7 email to Lengacher that followed the May 7 meeting described above. Contrary to her Petition's description (Petition, pg. 12), Hatmaker did not express a concern that women were excluded from the prior chaplain department's director's memorial service, but rather only that a Jewish Rabbi and Catholic priest were asked to present prayers and readings at that event, rather than female clergy. Her May 7 email also made no mention of Rev. Stafford's having come from "a tradition that excluded women from the clergy." (Petition, pg. 12).

Given that Hatmaker had brought nothing but unsupported concerns to Lengacher's attention, Hester instructed Lengacher to provide guidance to Hatmaker as to Memorial's expectations going forward. This was done on May 11, 2007. Hatmaker once again provides only a selectively edited version of the meeting at which that occurred. (Petition, pg. 14). Hatmaker was instructed at that meeting not to engage in gossip about Stafford or to speculate that Stafford needed counseling. Hatmaker was advised that the need for her to consider whether she could continue at Memorial would only be triggered by a decision on Hatmaker's part that she could not be supportive of Stafford's leadership of the chaplain department. Hatmaker described this meeting as ending "affably" and that she viewed this meeting to be the end of her interaction with Memorial on this topic.

But Hatmaker had to have the last word. On May 11, 2007, after leaving her meeting with Lengacher, Hatmaker sent one more email to Hester and Lengacher to which Hatmaker gives remarkably little attention in her Petition on pages 14-15. This is surprising as it was this email that ultimately triggered the events that led to the loss of her employment. In that email Hatmaker expressed that (even though she had no support for such a position) she hoped that Memorial would continue to be sensitive to possible gender issues surrounding Stafford because of his Southern Baptist faith (thereby ignoring Memorial's conclusion that she had brought forth no

reason to be so concerned). She also stated her intention to direct her concerns to Stafford directly "with hope that he will seek professional guidance" (thus also evidencing that she was still stuck on the belief that Stafford needed counseling). She added that she also now "questioned" whether encouraging women to speak to Hester or Stafford about workplace concerns was the right thing to do. (See App. pg. 31-32 for additional description of this email.)

Hatmaker clearly and firmly assigned Stafford a status in her own mind without a reason to do so ("trafficking in stereotypes," in the words of the Seventh Circuit, App. pg. 10), and now appeared to be forming one about Memorial's Human Resources Department as well. When Hatmaker did nothing during a 30-day leave period to convince Memorial to the contrary, her *per diem* employment was ended in June 2007.

With Hatmaker's Statement of the Case now corrected, the Court can properly evaluate the merits of Hatmaker's Petition.

REASONS FOR DENYING WRIT

I. This Case is Not the Vehicle Needed to Address any Issue Left Unresolved by the Supreme Court in *Crawford v. Metro. Gov't of Nashville & Davidson County*

Hatmaker begins her Petition by suggesting that this Court left open a needed interpretation of Section

704(a) of Title VII of 1964 Civil Rights Act, 42 U.S.C. §2000e-3(a), when this Court decided the case of *Crawford v. Metro. Gov't of Nashville & Davidson County*, 552 U.S. 1162, 129 S. Ct. 846 (2008) and invites this Court to use her case as a vehicle to address that void. (Petition, pg. 2). Specifically, Hatmaker claims that this Court needs to decide whether the "participation clause" of Section 704(a) extends to offer protection to one who is compelled to "participate in a purely internal investigation." (Petition, pg. 17). To the extent this issue needs to be addressed at all, this case is not the vehicle by which to do so because Hatmaker did not in fact participate in an investigation and brought forth no issue that Title VII was designed to address.

Memorial's May 7, 2007, interview of Hatmaker was not an internal investigation of alleged discriminatory practices protected by Title VII. It was instead no more than a preliminary inquiry to determine what if anything Hatmaker was alleging in her April 30 email. When Hatmaker herself made clear that she was bringing forth no allegation of actual gender specific misconduct engaged in by Stafford, and instead appeared focused on her own prejudicial view of certain religious denominations, the preliminary inquiry ended. Even the EEOC's broad reading of Section 704(a)'s participation clause (See Petition, pg. 20) requires the participant to verbalize "alleged discriminatory practices." Since Hatmaker affirmatively denied that Stafford engaged in any such practices, her case does not provide a vehicle to

re-examine a clause designed to protect individuals who participate in internal investigations where discriminatory practices are actually alleged.

In support of her position Hatmaker identifies selected provisions of the U.S. Equal Employment Opportunity Commission's Compliance Manual which opine that those who cooperate with internal workplace investigations of unlawful discrimination are opposing practices made unlawful by Title VII. (Petition, pg. 19-20). These individuals are thus protected by Section 704(a)'s "opposition" clause in the opinion of the EEOC. In this Court's opinion in *Crawford*, this Court agreed that one who speaks out about discrimination in answer to questions from her employer in an internal investigation obtains opposition clause protection. *Crawford*, 129 S. Ct. at 849. The mechanism needed to protect employees who respond to workplace inquiries about matters addressed by Title VII has thus already been identified by this Court: Section 704(a)'s opposition clause.

Hatmaker is unable to cloak herself in the opposition clause's protection, however, because she, by her own admission, has brought forth nothing that Title VII seeks to prohibit. She only brought forth certain unsubstantiated and prejudiced concerns about her boss's ability to interact with women and argues that because her employer's human resource professionals heard her out rather than ignoring her altogether that she gains standing to claim protection by Section 704(a)'s participation clause as one who participated in an internal investigation. Hatmaker

thus is not asking this Court to interpret the "participation clause." She is asking this Court to re-write it – a task better left to Congress if such a need exists.

II. There is No Conflict Amongst the Circuits as to the Scope of the Participation Clause

In holding that Section 704(a)'s participation clause was only designed by Congress to protect participation in official investigations and related proceedings initiated by the filing of a Charge of Discrimination with the EEOC, the Seventh Circuit noted that it was interpreting Section 704(a) in the same manner as the Eighth Circuit (*Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999)) and the Eleventh Circuit (*EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000)).

The Seventh Circuit could have added that its holding was in line with decisions rendered by the Fifth Circuit (*Byers v. Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000)), the Sixth Circuit (*Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 543 (6th Cir. 2003)), and the Tenth Circuit (*Archuleta v. Colorado Dept. of Institutions, Div. of Youth Services*, 936 F.3d 483, 487 (10th Cir. 1991)), all of which recite that participation clause protection is dependent upon initiation of EEOC proceedings.

The only place one can discern even a whiff of conflict is within the Ninth Circuit which in 1990 rendered an opinion consistent with the Seventh

Circuit's disposition of this case (*Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990)) and subsequently rendered one which took a contrary position (*Hashimoto v. Dalton*, 118 F.3d 671, 679-80 (9th Cir. 1997)). In rendering its decision in *Hashimoto* the Ninth Circuit did not mention its earlier *Vasconcelos* opinion and no Circuit Court has interpreted *Hashimoto* as overruling *Vasconcelos*. Thus at most, the Ninth Circuit has an issue internal to itself to resolve before it can be said that the Ninth Circuit has weighed in on an issue contrary to the position taken by *every other Circuit* that has had occasion to address it.[1]

The reason for this unanimity is simple. Section 704(a) of Title VII specifically provides that protection only extends to those who have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing *under this subchapter*. 42 U.S.C. §2000e-3(a) (emphasis added). Title VII does not require that employers perform internal investigations to look into any unsupported concern of any employee. Thus internal investigations in the absence of the filing of any

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[1] Two recent U.S. District Court cases from the Ninth Circuit quote from *Vasconcelos* and not *Hashimoto* thus suggesting that *Hashimoto* is not being looked to for guidance even within the Ninth Circuit on this issue. *Rucker v. Vilsack*, 2010 U.S. Dist. LEXIS 37994 (D. OR 2010); *Snider v. Greater Nevada LLC*, 2009 U.S. Dist. LEXIS 95749 (D. NV 2009).

Charge of Discrimination are not proceedings "under this subchapter."

Finally the *Scott* and *Evans* cases cited by Hatmaker as further evidence of inconsistency within the Circuits do not stand for the proposition for which they are presented. (Petition, pg. 21-22). In *Scott v. County of Ramsey*, 180 F.3d 913 (8th Cir. 1999), the issue of whether or not the plaintiff's participation in an internal sexual harassment investigation triggered participation clause protection was not made an issue for decision in that case. In *Evans v. City of Houston*, 246 F.3d 344, 352, n.7 (5th Cir. 2001), the Fifth Circuit noted in a footnote that the issue of whether or not the plaintiff's participation in internal grievance procedures was protected conduct was not ripe for argument due to an earlier request for admission response made during discovery proceedings in the case. In any event, in light of the decisions reached by the Eighth and Fifth Circuits in *Brower* and *Byers* respectively, those Circuits are already on record as having issued decisions on the merits which are consistent with the decision reached by the Seventh Circuit in *Hatmaker*. There thus is no conflict in the Circuits ripe for resolution by the Supreme Court under the facts presented in this case.

III. Inasmuch as Hatmaker has no Standing to Claim Participation Clause Protection, That Which She Said to Memorial Does Not Merit Review by This Court

Hatmaker's final argument is that her case merits review because of the Seventh Circuit's alternative grounds for affirming the summary dismissal of her case, namely a decision based on a review of the evidence in the record that Hatmaker had not engaged in conduct triggering Title VII protection. (Petition, pg. 22, App.7). Hatmaker characterizes the Seventh Circuit as holding that Hatmaker engaged in "bad judgment" and then adds her own words "during the course of an investigation." (Petition, pg. 23). This, however, is a clear misreading of the Seventh Circuit's holding. The "bad judgment" engaged in by Hatmaker was her May 11 email issued *after* she agreed that Memorial's inquiry into her concerns had ended. Thus this case does not call for an interpretation of comments Hatmaker made during the course of Title VII proceedings, as was at issue in *Glover v. South Carolina Law Enforcement Division*, 170 F.3d 411 (4th Cir. 1999). Any split in authority as to what can be made of comments uttered during the course of a legitimate Title VII investigation will need to await a vehicle that can properly transport those concerns to this Court.

In any event, given that the record and law are clear that Hatmaker had not triggered participation clause protection because of her failure to institute Title VII proceedings, there is no need for this Court

to even consider reviewing this alternative ground for affirming the decision of the U.S. District Court.

CONCLUSION

Hatmaker's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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